Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)
Alpine PCS, Inc.)
Request for Waiver of Automatic Cancellation)
Rule for Auction No. 5 C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis)
Obispo (Mkt. No. 405-C))

ORDER

Adopted: January 29, 2007 Released: January 29, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address the Request for Waiver ("Request") of the Commission's automatic cancellation rule filed on behalf of Alpine PCS, Inc. ("Alpine"), with respect to Personal Communications Services ("PCS") C Block licenses for Santa Barbara, California (BTA 406), and San Luis Obispo, California (BTA 405) (collectively the "Licenses"). After winning the Licenses in Auction No. 5, Alpine defaulted on installment payments for the Licenses, which resulted in their automatic cancellation. Alpine's Request asks the Commission to waive the application of the Commission's automatic cancellation rule for several reasons. As explained below, we find the arguments presented on behalf of Alpine to be without merit and we deny its Request.

II. BACKGROUND

A. The Commission's Installment Payment Program

2. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment program under which qualified small businesses that won licenses in certain services

¹ In Re the Matter of Alpine PCS, Inc., For a Waiver of Section 1.2110(g)(iv) of the Rules Relating to the Payment Due on July 31, 2002 Regarding its Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C) C Block Licenses, Request for Waiver, filed July 31, 2002 ("Request"). Although the Request seeks a waiver of "Section 1.2110(g)(iv)," we understand that the waiver request relates to the automatic cancellation provision of Section 1.2110(g)(4)(iv), 47 C.F.R. § 1.2110(g)(4)(iv).

² Alpine also states that it seeks restructuring of its debt on the Licenses. Request at 1. However, Alpine's Request provides no information that would serve as a basis for considering the restructuring of its debt. Accordingly, we do not address the issue of debt restructuring in this Order.

were allowed to pay their winning bids in quarterly installments over the initial term of the license.³ In deciding to offer installment payment plans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrumbased services.⁴ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁵ When in 1997 the Commission discontinued the use of installment payments for future auctions,⁶ it allowed entities that were already paying for licenses in installments to continue doing so.⁷

3. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. Thus, the rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures.⁸ In 1997, however, the Commission liberalized its installment payment grace period rules for

(continued....)

³ Implementation of Section 309(j) of the Communications Act − Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) *("Competitive Bidding Second Report and Order")*. The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

⁴ *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

⁵ See 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) ("Part 1 Third Report and Order"). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 ("Part 1 Reconsideration of Third Report and Order"). The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

⁷ Part 1 Third Report and Order. 13 FCC Rcd at 436 ¶ 106.

⁸ See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a

those licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request. The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request. The amended rules also entitled all licensees paying in installments to a grace period of 180 days. If a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee. If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment. A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default.

- 4. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions, ¹⁴ and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred. ¹⁵ Noting that a grace period is an extraordinary remedy in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default. ¹⁶
- 5. In 2000, the Commission simplified the grace periods for participants in installment payment plans by replacing the two 90-day grace periods with two quarterly grace periods.¹⁷ This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.¹⁸

B. Alpine

6. Alpine won the Licenses in Auction No. 5, which closed on May 6, 1996, with net winning

failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

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⁹ 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

 $^{^{10}}$ 47 C.F.R. § 1.2110(f)(4)(i) & (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

¹¹ 47 C.F.R. § 1.2110(f)(4)(i) (1998); Part 1 Third Report and Order, 13 FCC Rcd at 436 ¶ 106.

¹² 47 C.F.R. § 1.2110(f)(4)(ii) (1998); Part 1 Third Report and Order, 13 FCC Rcd at 436 ¶ 106.

¹³ 47 C.F.R. § 1.2110(f)(4)(iv) (1998).

¹⁴ Part 1 Third Report and Order, 13 FCC Rcd at 439-40 ¶ 110.

¹⁵ *Id.* at 443 ¶ 116.

 $^{^{16}}$ Id. at 439-40 $\P\P$ 109-10; Part 1 Reconsideration of Third Report and Order, 15 FCC Rcd at 15,304-05 \P 19.

¹⁷ 47 C.F.R. § 1.2110(g)(4)(iv) (2000).

 $^{^{18}}$ Part 1 Reconsideration of Third Report and Order, 15 FCC Rcd at 15310 \P 28.

bids of \$19,200,750 (Santa Barbara) and \$9,891,000 (San Luis Obispo). As a small business, Alpine was eligible to participate in the Commission's installment payment plan then available to qualified designated entities, and it chose to do so. In keeping with the Commission's rules, grant of the Licenses was conditioned on full and timely payment of all installment obligations. Alpine was scheduled to make interest-only payments for the first six years of the ten-year license term. Payments of interest and principal were to be amortized over the remaining four years.

- 7. Alpine began making its installment payments under the Commission's original installment payment rules. When the Commission's amended rules providing for automatic grace periods became effective on March 16, 1998, Alpine became subject to those rules.²¹ Likewise, when the Commission replaced the two 90-day grace periods with two quarterly grace periods in 2000, Alpine became subject to the revised schedule for submitting late payments.²²
- 8. Alpine failed to make the interest-only installment payments for the Licenses due on January 31, 2002, along with the required late fees, before the expiration of the two-quarter grace period permitted under the rules.²³ On July 31, 2002, rather than make the required payments, Alpine filed its Request. Pursuant to the Commission's rules, the Licenses automatically canceled on August 1, 2002. Alpine accordingly became subject to debt collection procedures.
- 9. Alpine seeks waiver of the automatic cancellation rule on various grounds. First, Alpine asserts that at the time of its default the telecommunications industry was in a state of "collapse" and that increased spectrum capacity in the marketplace had led to plummeting spectrum values.²⁴ Based on this assertion, Alpine argues that strict enforcement of the Commission's installment payment rules would be contrary to the public interest.²⁵ Second, Alpine argues that the grant of a waiver would be consistent with the public interest because of its construction of cell sites and its plans for more, as well as its dedication to providing "wireless value to local residents."²⁶ Third, Alpine contends that, "[w]hile there is nothing unique about Alpine's suffering,"²⁷ Alpine's overall situation is unique because it had complied with all of its payment requirements and had met its first build-out requirement as of the filing of its

¹⁹ *Public Notice*, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996). These bids, which represent the amounts Alpine actually owed, were net of the 25 percent bidding credit for which Alpine, as a small business, qualified.

²⁰ Section 1.2110(e)(4)(1996) of the Commission's rules expressly provided that "[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." Grant of the Licenses was announced in *Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses," 11 FCC Rcd 11316 (1996).

 $^{^{21}}$ See Part 1 Third Report and Order, 13 FCC Rcd at 436 \P 106.

²² See Part 1Recondsideration of Third Report and Order, 15 FCC Rcd at 15,310 ¶ 28.

²³ As noted above, Alpine was scheduled to make interest-only payments for the first six years of the ten-year term of the Licenses. Consequently, Alpine was not scheduled to begin making payments on the principal owed until January of 2003.

²⁴ Request at 4.

²⁵ *Id*.

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 4.

waiver request.²⁸ Alpine further maintains that its situation is unique because it is not affiliated with any large carrier and because its financial problems were caused not by insincere bidding, but by the failure of

 $[\]frac{1}{28}$ *Id.* at 4-5.

its equipment vendor to provide financing as previously promised.²⁹ Fourth, Alpine cites a variety of "developments" that it contends the Commission should consider.³⁰

10. In addition to presenting arguments for a waiver of the automatic cancellation of the Licenses, Alpine asserts that automatic license cancellation is unenforceable because it is inconsistent with the requirement in Section 312(c) of the Communications Act ("the Act") that licensees be given an opportunity for hearing prior to license revocation under Section 312(a). According to Alpine, the Commission was without authority to promulgate the automatic cancellation rule because Section 309(j)(6) of the Act prohibits it from modifying licensees' right to a pre-revocation hearing under Section 312(c). Alpine further argues that the Commission cannot properly enforce the license condition of full and timely payment through automatic cancellation because its power to place conditions on licenses is limited to those "not inconsistent with law."

III. DISCUSSION

A. Request for Waiver of the Automatic Cancellation Rule

- 11. To obtain a waiver, Alpine must show either that: (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.³³ As discussed below, Alpine fails to make either showing necessary to support the grant of a waiver.
- 12. With respect to the first prong of the waiver standard, Alpine fails to establish that the underlying purpose of the Commission's automatic cancellation rule would not be served by its application in this case. The Commission's competitive bidding system was designed to serve a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.³⁴ Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based

³⁰ *Id.* at 5-6. Specifically, Alpine argues that the following "developments" lend support to its request for waiver: (1) a call by the Chairman of the Commission in 2002 for legislation to aid recovery of the telecommunications industry; (2) Congressional letters filed on Alpine's behalf; (3) a proposal Alpine "understood to be in process" at the time of the waiver request that might permit those entities with "remedial bidding credits" to use the credits to retire existing auction debt; and (4) the fact that the Supreme Court had scheduled oral argument in *FCC v. NextWave Personal Communications Inc.* ("*NextWave*"), which concerned the intersection of bankruptcy law and the Communications Act, for the fall of 2002. Oral argument was held on October 8, 2002. The case was decided in 2003. 537 U.S. 293 (2003).

²⁹ *Id*. at 5.

³¹ Request at 8-12 (citing 47 U.S.C. §§ 309(j)(6) & 312).

³² Request at 7-12.

³³ 47 C.F.R. 81.925.

³⁴ 47 U.S.C. §§ 309 (j)(3)(A) & (D). *See also* H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

services;³⁵ they were not, however, intended to allow the retention of licenses by parties unable to pay for the licenses and provide service. Indeed, since the inception of the auctions program, the Commission has endeavored to prevent entities that lack the financial capacity to pay their winning bids and operate communications systems from undermining the rapid deployment of service and the efficient, intensive use of spectrum.³⁶

- 13. With respect to the automatic cancellation rule in particular, the Commission repeatedly has emphasized that the application of this rule enhances the integrity of the auction and licensing process by ensuring that licenses are awarded to those qualified bidders that value the spectrum most highly by virtue of their capacity to pay for the licenses, build out systems, and provide service to the public. ³⁷ Allowing winning bidders to retain licenses when they are unable to pay their winning bids prevents the auction process from assigning licenses to those parties best able to serve the public. At the same time, precluding licensees from keeping licenses when they do not timely pay their winning bids reduces the incentive for bidders to make bids they cannot pay and increases opportunities for other bidders to win licenses. ³⁸ Thus, strict enforcement of the automatic cancellation rule is essential to a fair and efficient licensing process for all participants in Commission auctions, including both those that win licenses and those that do not, which in turn promotes economic opportunity, competition in the marketplace, and the rapid deployment of services for the benefit of the public. ³⁹
- 14. When licensees that are paying winning bids in installments fail to pay the principal and related interest in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the spectrum is lost.⁴⁰ In certain circumstances a

³⁵ Competitive Bidding Second Report and Order, 9 FCC Rcd at 2388 ¶ 229.

³⁶ As noted above, for example, when the Commission amended its grace period rules in 1997, it declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default. *See supra* paragraph 4. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-82 ¶¶ 189-192 (discussing importance of down payments that will ensure that winning bidders are able to pay full amount of their winning bids, rapidly deploy their systems, and operate them in an efficient manner); *id.* at 2390 ¶ 237 (deciding not to allow installment payments for large spectrum blocks in order to avoid delay of service to public that could result from encouraging undercapitalized firms to acquire licenses they lack the resources to finance adequately).

³⁷ Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25,106, ¶ 7 (2000) ("*Southern MO&O*"); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,123-24 ¶ 22 (2000) ("*21st Century MO&O*"), *aff'd*, *21st Century Telesis Joint Venture v. FCC*, 318 F3d 192 (D.C. Cir. 2003). *See also* Request of GLH Communications, Inc., for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. § 1901 et seq.), 18 FCC Rcd 14,695, 14,699 ¶ 11 (WTB/AIAD 2003) ("*GLH Order*"); Duluth PCS, Inc. and St. Joseph PCS, Inc., Request for Partial Waiver of Section 1.2110(g) of the Commission's Rules, *Order*, 19 FCC Rcd 7137, 7139-40, ¶ 5 (WTB/ASAD 2004) ("*Duluth PCS Order*").

³⁸ See, e.g., Duluth PCS Order, 19 FCC Rcd at 7139-40.

See, e.g., 21st Century MO&O, 15 FCC Rcd at 25,123-24 ¶ 22. See also Mountain Solutions, Ltd., Inc. v. FCC, 197 F.3d at 518. ("Having established a more lenient payment structure for designated entities, which by definition usually faced problems of accessing financial resources, the Commission could reasonably focus on the importance of meeting payment deadlines to deter such entities from abusing the lenient structure by "'shop [ping]' a winning bid in order to obtain financing for a payment. The Commission also could reasonably rely on strict enforcement of the deadlines to provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.") (citations omitted).

⁴⁰ See, e.g., 21st Century MO&O, 15 FCC Rcd at 25,123-24 ¶ 22.

party that loses this presumption may be able to show that its failure to meet a payment deadline was not due to an inability to pay and that there is no question as to whether the auction assigned the license to the party best able to put the spectrum to efficient and effective use. ⁴¹ That is not the case here, however. Alpine has indicated that it did not meet its payment obligations for the Licenses because of financial distress that rendered it unable to make its payments. ⁴²

15. Consistent with the purpose of the automatic cancellation rule, Commission precedent makes clear that neither individual nor marketplace financial difficulties warrant a waiver of the rule.⁴³ The Commission's installment payment program provides licensees with a substantial amount of time in which to pursue private market solutions to financial problems.⁴⁴ The Commission repeatedly has observed that "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."⁴⁵ Alpine's contention that it bid sincerely in the auction does not alter the fact that it was unable to meet its payment obligations for the Licenses, which obligations it established by choosing to outbid other auction participants.⁴⁶ Likewise, Alpine's claim that its inability to make its payments was caused by a third party provides no basis for a waiver of the automatic cancellation rule. Every licensee is

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⁴¹ See, e.g., Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, *Order*, 21 FCC Rcd 1182 (2006); Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, *Order*, 21 FCC Rcd 1627 (2006).

⁴² Request at 3 ("Alpine now finds itself in a position where it cannot make all payments due and owing to the federal government....").

⁴³ See, e.g., See BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, Memorandum Opinion and Order, 15 FCC Rcd 17,590, 17,604-07 ¶ 26-30 (2000) ("BDPCS MO&O"); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Jorge J. Inga, M.D., and Rafael Blanco, M.D., Pan American Interactive Corporation, 18 FCC Rcd 15,314, 15,317-18 (2003) ("Pan American Interactive Letter"); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Stephen Diaz Gavin and Paul C. Besozzi, Patton Boggs, LLP, Counsel for U.S. Telemetry Corporation, 17 FCC Rcd 6442, 6447 (2002) ("U.S. Telemetry Letter").

⁴⁴ Part 1 Third Report and Order, 13 FCC Rcd at 439-40 ¶ 110 (discussing consistency of rules with standard commercial practice); Letter to Mr. John Jung, Jung on Jung, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 14,427, 14,430 (2003); U.S. Telemetry Letter, 17 FCC Rcd at 6446. See also Southern MO&O, 15 FCC Rcd at 25,110 ¶ 15.

⁴⁵ Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,072-73 ¶ 4 (1998) ("C and F Block Installment Payment Order"), recon. denied, 14 FCC Rcd 6080 (1999), aff'd., SouthEast Telephone v. FCC, No.99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) (unpublished decision) (quoting Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 ¶ 24 (1998)). See also Southern MO&O, 15 FCC Rcd at 25,110 ¶ 15; Letter to Mr. Kurt Schueler, President of New England Mobile Communications, Inc. from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 19,355, 19,357-58 (2001).

⁴⁶ See BDPCS MO&O, 15 FCC Rcd at 17,607-08 ¶ 31 (emphasizing that defaulting licensee's motivation in not withdrawing from auction was not relevant to decision regarding default payment because rules do not require finding of "bad faith" as a prerequisite to imposition of full default payment).

responsible for its business decisions, including decisions to enter into arrangements with particular parties for financing. 47 Moreover, as noted below, all licensees must anticipate the possibility of downturns in the marketplace. 48

- 16. By ensuring that licenses are awarded based on winning bids that the bidder is able to pay, the automatic cancellation rule serves a crucial function in assuring that licensees are in a position to provide service to the public. Alpine's acknowledged financial difficulties and failure to make any payment on its outstanding debt since 2002 demonstrate its inability to respond to the fluctuations of the marketplace and call into question its ability to bring service to the public. Enforcement of automatic cancellation in these circumstances serves the underlying purpose of the rule. Indeed, in light of Alpine's claims of financial distress, grant of a waiver to Alpine would undermine, rather than serve, the purpose of the rule.
- 17. We also disagree with Alpine's contention that a grant of its waiver request would be in the public interest because of its construction of cell sites and its plans for the provision of service. ⁴⁹ Any benefit that might be realized by reinstating the Licenses is speculative at best and is outweighed by the harm to competition and the public interest that would be caused by granting a waiver of payment obligations to an entity that has admitted it lacks the financial qualifications to remain a Commission licensee. Thus, even where defaulting licensees were providing service, the Commission has denied requests for an extension of installment payment deadlines. ⁵⁰
- 18. With respect to the second prong of the waiver standard, we are not persuaded that Alpine has presented any unique facts or circumstances that merit waiving the automatic cancellation rule. Alpine's difficulties with its equipment vendor do not amount to unique circumstances. The Commission has previously determined that "it cannot take into account the private business arrangements that an applicant has made to finance its successful bid" and that an unanticipated lack of financing is not a special circumstance warranting a deviation from the Commission's payment rules. Moreover, all licensees face potential fluctuations in the marketplace, and an economic downturn can be expected to affect many installment payors. As we have previously explained, such downturns are not unique circumstances that provide grounds for a waiver of payment deadlines.
- 19. Alpine's payment history also does not place it in a unique category for purposes of seeking a waiver. Alpine contends that it is among a few PCS C Block licensees that met all installment payment

⁵⁰ See Duluth PCS Order, 19 FCC Rcd at 7141-42 ¶¶ 8-9; GLH Order, 18 FCC Rcd at 14,699-700 ¶ 12 (citing Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, Order, 13 FCC Rcd 22,071, 22,077 (1998)).

⁴⁷ See, e.g., Southern MO&O, 15 FCC Rcd at 25,107 ¶ 30 (finding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); BDPCS MO&O, 15 FCC Rcd at 17,604-07 ¶¶ 27-30 (finding that loss of expected source of funding cannot justify waiver of the Commission's rules and that Commission is not required to "police the private business activities of each bidder").

⁴⁸ See infra paragraph 18.

⁴⁹ Request at 2-3.

⁵¹ See, e.g., BDPCS MO&O, 15 FCC Rcd at 17,606-07 ¶ 30.

⁵² See, e.g., BDPCS MO&O, 15 FCC Rcd at 17,606-07 ¶ 30; C and F Block Installment Payment Order, 13 FCC Rcd at 22m072 ¶ 4 ("The challenge of raising capital to finance ... licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.' ").

⁵³ See, e.g., Pan American Interactive Letter, 18 FCC Rcd at 15,317-18; U.S. Telemetry Letter, 17 FCC Rcd at 6447.

obligations up to the point of making a waiver request.⁵⁴ However, at the time of its Request, Alpine still owed 90 percent of the principal amount of its winning bid for each license. Indeed, apart from the 10 percent down payment required to obtain the Licenses, Alpine made no payment of principal up to the time of the Request and has not made any payment towards its outstanding debt obligation in over four years.⁵⁵ Under these circumstances, the length of time that Alpine made interest-only payments does not constitute a unique circumstance that would make enforcement of the automatic cancellation rule inequitable. Similarly, Alpine's claim that it is not affiliated with another entity does not place it in a unique category. The automatic cancellation rule applies to all installment payor licensees, regardless of whether they are affiliated with other entities.

- 20. Alpine also cites a variety of "developments" as of the date of the Request that it claims support granting it a waiver. ⁵⁶ In this regard, Alpine asserts that potential regulatory and legal developments pending at the time of the Request should be taken into account. ⁵⁷ Specifically, Alpine cites a press release describing steps proposed by former Chairman Michael Powell to aid the telecommunications industry; the idea of allowing entities to use remedial bidding credits to retire debt, which Alpine calls a "creative new potential solution[] ... understood to be in process"; and the Supreme Court's scheduling of oral argument in the *NextWave* case. ⁵⁸ The Commission's exploration of various means of supporting the telecommunications industry generally does not require the grant of a waiver of the installment payment rules to Alpine. The 2002 press release cited by Alpine outlines steps such as protecting continuity of service to consumers, rooting out corporate fraud, and promoting new services. There is nothing in this press release that suggested that the Commission should waive its installment payment rules. ⁵⁹ Alpine's vague discussion of remedial bidding credits also provides no support for the proposition that the Commission's installment payment rules should be waived where entities are unable to pay their winning bids for licenses.
- 21. Furthermore, neither the scheduling of the *NextWave* oral argument by the Supreme Court, nor the final outcome of that case, provides a basis for granting a waiver to Alpine. The issue in *NextWave* was whether Section 525(a) of the Bankruptcy Code barred the FCC from canceling the licenses of a debtor in a Chapter 11 bankruptcy case. The Supreme Court held that automatic

⁵⁴ Request at 5.

⁵⁵ All of the payments Alpine made were for interest only.

⁵⁶ Among other things, Alpine argues that consideration should be given to letters that members of Congress filed with the Commission on its behalf. Request at 5 (citing letters from Senators Carl Levin and Debbie Stabenow, Congresswoman Lois Capps, and Congressmen Bart Stupak and Christopher Shays). The Commission fully considers all correspondence it receives from members of Congress, and we have done so in this case. We must, however, apply the standard cited above and grant waivers of the Commission's rules only where the facts of the case support doing so.

⁵⁷ Request at 5-6.

⁵⁸ *Id.* (citing *News Release*, "FCC Chairman Michael Powell Outlines Six Critical Steps for Telecom Industry Recovery; Calls for Legislation in Three Areas" (rel. July 30, 2002)).

⁵⁹ Indeed, the press release stressed the importance of firms paying down their debt as well as the efficient use of spectrum.

⁶⁰ As noted above, oral argument was held on October 8, 2002, and the Court's decision was issued in 2003. *NextWave*, 537 U.S. 293.

⁶¹ Section 525(a) provides in pertinent part:

cancellation for failure to make a required installment payment under the Commission's rules was precluded in a Chapter 11 bankruptcy by Section 525. However, where Section 525(a) does not apply, nothing in the *NextWave* decision prevents the regular operation of the Commission's rules. Alpine was not in bankruptcy when it filed the Request, and Section 525(a) does not apply to this case. For that reason, we reject Alpine's attempt to analogize its situation to that of licensees that filed for Chapter 11 bankruptcy protection prior to missing required installment payments. 63

B. The Commission's Authority to Enforce Automatic Cancellation

22. Alpine also asserts that the Commission's automatic cancellation rule is unenforceable because it is inconsistent with Section 312(c) of the Communications Act, which requires the Commission to provide an opportunity for a hearing "[b]efore revoking a license or permit pursuant to subsection (a)." Section 312(c) mandates an opportunity for a hearing, however, only prior to "revocation" of a license for one of the reasons listed in Section 312(a). The failure to comply with the payment requirements for auctioned licenses is not among these enumerated reasons. Thus, when a licensee fails to meet its installment payment obligations, the Commission does not revoke the license pursuant to Section 312. Instead, the license cancels automatically pursuant to Section 1.2110(g)(4)(iv) without Commission action, and the hearing requirement of Section 312(c) is not triggered. Alpine argues that license "cancellation" is a form of "revocation" and that the Commission is therefore required to provide it with an opportunity for hearing under Section 312(c). We disagree. Regardless of the term used, it is clear that Section 312(c) applies only to the revocation of licenses for the reasons stated in

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[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to ... a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act solely because such bankrupt or debtor ... has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

⁶² In 2003, affiliates of Alpine entered bankruptcy, but Alpine itself did not. *See RFB Cellular, Inc.*, Case No. ND 03- 12187-RR (Bankr. C.D. Cal.). The debtors in that case are RFB Cellular, Inc., Alpine-California F, LLC, Alpine Investments, LLC, Alpine-Michigan F, LLC, Alpine-Michigan E, Inc., Alpine-Hyannis F, LLC, and Alpine-Fresno C, LLC.

⁶³ Specifically, we reject Alpine's suggestion that the facts of the instant case are analogous to those in Airadigm Communications, Inc., *Order*, 18 FCC Rcd 16296 (WTB 2003). In that Order, the Wireless Telcommunications Bureau, consistent with the Supreme Court's decision in *NextWave*, clarified that, because Airadigm was under the protection of Chapter 11 of the Bankruptcy Code, the Commission's automatic cancellation rule was ineffective. Unlike Airadigm, Alpine did not default on its payment obligations while under the protection of the Bankruptcy Code.

⁶⁴ Request at 7-12 (citing 47 U.S.C §312(c)).

⁶⁵ See California Metro Mobile Communications, Inc. v. FCC, 365 F.3d 38, 45 (D.C. Cir. 2004) ("That the Congress took care to specify in section 312 the circumstances following the grant of a license that warrant its revocation tends to show that if the Congress was focused on post-grant events, it mentioned them").

⁶⁶ Request at 8-10. Alpine cites the Supreme Court's *NextWave* decision to support its argument. That case, however, discussed the "revocation" of NextWave's licenses only in the context of determining the Court's jurisdiction under Section 402, 47 U.S.C. § 402, and the application of Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a). The Court had no occasion to rule on whether the Commission's automatic cancellation of NextWave's licenses for non-payment of its auction debt required a prior hearing under Section 312(c). *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (judicial decisions do not serve as precedent for points that were not raised and analyzed).

Section 312(a).

23. We also reject Alpine's argument that the automatic cancellation rule is unenforceable because the Commission was without the authority to promulgate such a rule. According to Alpine, Congress denied the Commission the authority to cancel licenses without a hearing by enacting Section 309(j)(6) of the Communications Act, which states, inter alia, that the use of competitive bidding shall not limit or otherwise affect the requirements of other sections of the Act. 67 Alpine contends that Section 309(i)(6) prohibited the Commission from depriving holders of licenses won at auction of their right to a pre-revocation hearing under Section 312(c) and from conditioning such licenses on timely payment. 68 In adopting the automatic cancellation rule and in conditioning licenses on the full and timely fulfillment of installment payment obligations, the Commission did not, however, limit or otherwise affect the provisions of Section 312. As explained above, Section 312 governs the revocation of licenses by the Commission based on particular circumstances listed in Section 312(a), and the hearing requirement of Section 312(c) applies only to revocations of licenses based on those circumstances. The automatic cancellation rule therefore does not conflict with Section 312(c) and is not prohibited under Section 309(j)(6). Moreover, the Act authorizes the Commission to impose conditions on the grant of a license.⁶⁹ and it specifically provides for the automatic cancellation of licenses for failure to meet conditions of the license grant. The United States Court of Appeals for the District of Columbia Circuit also has recognized that licenses cancel automatically, outside of the provisions of Section 312, if the licensee fails to abide by a condition of the license grant. In sum, we find that the Commission had clear authority to promulgate the automatic cancellation rule and that there is no impediment to the rule's enforcement.

One of Peninsula's remaining challenges is that the 2001 order revoked the licenses without a hearing as required in 47 U.S.C. § 312(c). But the Commission did not revoke any of the licenses. It conditionally granted the renewals and then rescinded the conditional grants for failure to satisfy the condition.

⁶⁷ Request at 10-12 (citing 47 U.S.C. § 309(j)(6)).

⁶⁸ Request at 10-12.

⁶⁹ Section 303(r) of the Act authorizes the FCC to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. § 303(r). Alpine argues that the condition of timely payment is not necessary to carry out the provisions of the Act. Request at 12. It was, however, well within the Commission's powers to decide that such a condition would further the aims of its competitive bidding program as identified by Congress. Section 301 of the Communications Act, as amended, provides in pertinent part that no license "shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. See also Capital Telephone Co. v. FCC, 498 F.2d 734, 740 (D.C.Cir.1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it").

⁷⁰ See 47 U.S.C § 319(b) ("permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified"). See also National Science and Technology Network, Inc. v. FCC, 397 F.3d 1013 (D.C. Cir. 2005) (affirming automatic license cancellation for failure to meet an express license condition).

⁷¹ See P&R Temmer v. FCC, 743 F.2d 918, 928 (D.C. Cir. 1984). See also Peninsula Communications, Inc. v. FCC, 55 Fed.Appx. 1 (D.C. Cir. 2003) (unpublished decision), where the Court stated that license termination pursuant to a conditional grant does not implicate the hearing requirement under Section 312:

IV. CONCLUSION

24. For the reasons set forth above, we conclude that application of the automatic cancellation rule in this case will not frustrate the underlying purpose of the rule, is not contrary to the public interest and is not inequitable, unduly burdensome, or otherwise contrary to the public interest. Indeed, we conclude that application of the automatic cancellation rule in this case serves the purpose of the rule.

V. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), the Request dated July 31, 2002, filed on behalf of Alpine PCS, Inc., seeking waiver of the Commission's automatic cancellation rule with respect to the Santa Barbara and San Luis Obispo licenses (47 C.F.R. §1.2110(g)(4)(iv)) is DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.⁷²

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr. Chief, Wireless Telecommunications Bureau

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⁷² 47 C.F.R. § 0.331.